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No. 851

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

DAISEY L. CUNNINGHAM ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on September 26, 1959.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 18–27) is reported at 270 F. 2d 545. Its opinion in the prior appeal (Appendix B, *infra*, pp. 28–36) is reported at 246 F. 2d 330.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1959, and rehearing was denied on November 12, 1959 (Appendix C, *infra*, pp. 37–38). By order of the Chief Justice of February 9, 1960, the time for filing a petition for a writ of certiorari

was extended to and including April 11, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Rule 71A(h) of the Federal Rules of Civil Procedure provides that any party to a federal condemnation proceeding may, upon demand, have a jury trial of the issue of just compensation. It further provides that the court, "because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice," may order that the issue of just compensation be determined by a commission of three persons appointed by it. The following questions are presented:[1]

1. Whether Rule 71A(h) authorizes the denial of the government's demand for a jury trial and the referral of a case to commissioners solely because of the "complexity of the matters to be considered on the question of valuation."

2. Whether, where a case has been properly referred to commissioners, an award of the latter may be judicially adopted where the commissioners (a) did not rule upon the admissibility of the evidence offered, and (b) did not make findings as to the value of the various constituent elements upon which they based their ultimate determination of the fair market value of the property condemned.

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[1] If certiorari is granted, the United States reserves the right also to contend that the condemnation award improperly included, as elements of value for which compensation was awarded, mineral values in the land and a claimed increase in the value of the boat-yard land that might result from possible channel improvements by the United States.

RULES INVOLVED

Rule 53(e), Federal Rules of Civil Procedure, provides in relevant part:

(e) *Report.*

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. * * *

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. * * * The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

* * * * * *

Rule 71A(h), Federal Rules of Civil Procedure, provides:

Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of

compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

STATEMENT

In August 1952, the United States filed a civil action to condemn several tracts of land near Nag's Head, North Carolina, for use as part of the Cape Hatteras National Seashore Recreational Area (J.A. I, 1–2).[2] The land is a peninsula about four miles long and one mile wide, lying between the Atlantic Ocean and Roanoke Sound (J.A. II, 30; App. B, *infra*, p. 29). It was bisected by a highway constructed in 1951 (J.A. II, 6, 31). The property was largely undeveloped; it had been used for hunting and there was a boat basin on the sound side (J.A. II, 6–7, 31–32).

This case involves primarily tract 12, for which a declaration of taking was filed on June 8, 1953 (J.A. I, 4–6). Tract 12 contains approximately 1,850 acres

[2] There have been two appeals in this case, and the certified record includes the joint appendix in each appeal. We shall refer to the joint appendix in the first appeal (case No. 7402) as "J.A. I"; the joint appendix in the second appeal (case No. 7817) will be referred to as "J.A. II".

and was owned by respondent W. A. Worth (J.A. II, 30). In 1948, Worth had plotted a subdivision of 100 lots of 50 feet frontage lying between the highway and the ocean (J.A. II, 30; App. A, *infra*, p. 19).[1]

The United States demanded a jury trial of the issue of just compensation (J.A. I, 2). Certain of the respondents moved for the appointment of commissioners (J.A. I, 6–9). The district court granted the motion and referred the issue of just compensation to a commission which it appointed, consisting of a lawyer and two real estate men (J.A. I, 9–13, 15–18; App. B, *infra*, pp. 31–32).

The commissioners conducted an extensive hearing, during which they made no rulings upon evidence but admitted everything that was offered (J.A. I, 72–694). The first report of the commission, filed in January 1956, was a two-page document which contained no detailed findings and merely stated that "The Commissioners award just compensation for each of the tracts of land involved in this proceeding" of $4,000 for tract 10 and $484,000 for tract 12 (J.A. I, 25–26). The district judge, although stating that "[m]y belief is that the value fixed by the Commissioners is probably greater than the land would have sold for on the open market on the date of the taking" (J.A. I, 63), nevertheless refused to hold that the commissioners' valuation finding was "clearly erroneous." The court made

[1] This case also involves tract 10, which consists of two lots which Worth had sold to respondent Cunningham in July 1951 for $1,800 (J.A. I, 144; J.A. II, 30).

extensive findings of its own, and approved, adopted and confirmed the report (J.A. I, 43–57).

On the government's appeal, the court of appeals reversed. 246 F. 2d 330, App. B, *infra*, pp. 28–36. The court first held that the district judge had acted "well within the limits of the discretion reposed in him by Rule 71A(h) in appointing the commission in this case" (App. B, *infra*, p. 30). After summarizing the findings upon which the district court based its order of reference, the court of appeals stated (App. B, *infra*, pp. 31–32) that the "justification of the appointment is the variety and complexity of the matters to be considered on the question of valuation * * *."

The court further held, however, that the commission's report was inadequate. It stated (App. B, *infra*, p. 33) that, if there was to be "any adequate review of the report", it was "essential" that the commissioners "make specific findings as to the matters on which their valuations were based and show in their report how they applied the applicable principles of law in reaching their ultimate conclusions. Particularly was this important in view of the fact that there were numerous objections to testimony, some of which was held by the lower court to be irrelevant and incompetent; and in the absence of such findings it is impossible to determine to what extent, if any, this testimony entered into the commission's valuation." The court stated (App. B, *infra*, p. 34) that, although the commission was not required to "rule on the admissibility of testimony and exclude that which was incompetent" or to "state that it was

admitting for a limited purpose testimony which was admissible only for that purpose," "for any intelligent review of its findings to be made, it was necessary that the commission indicate what use, if any, it had made of such testimony in arriving at its valuations." The court accordingly vacated the judgment of the district court with direction to remand the case to the commission "to the end that proper findings as to the basic facts may be made and that the commission may set forth the principles of law which it applies in arriving at its conclusion as to value" (App. B, *infra*, p. 36).

On remand, the commission filed a second report in which, after making various findings, it rendered the same awards as previously, namely, $484,000 for tract 12 and $4,000 for tract 10 (J.A. II, 29–43). The commission divided the property into four categories, each of which, it found, had a different "highest and most profitable use" (J.A. II, 33–34). One tract, comprising 345 acres fronting on the ocean, was found to have as its best use the "development of beach residential, neighborhood business and minor commercial uses" (J.A. II, 33). The best uses of the three other categories were found to be, respectively, (1) sport fishing and recreational facilities, (2) a boat basin, and (3) a hunting and fishing club (J.A. II, 33–34). The commission did not assign particular values to each of the four categories, but merely concluded, on the basis of various factors set forth in the report (J.A. II, 35–43), that it "came to the conclusion that the fair market value of Tract No. 10

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is $4,000.00 and of Tract No. 12, $484,000.00" (J.A. II, 43). The commission stated that it had not considered three specific items of evidence (J.A. II, 39–41), that it had given consideration to other specified evidence (*ibid.*), and that, with respect to objections to evidence showing sales of other property allegedly comparable, "if the Commissioners were of the opinion that the objection was properly taken, the testimony was not considered" (J.A. II, 39).

The district court (another district judge) rejected the report. It ruled (J.A. II, 46) that the report did not "meet the direction" of the court of appeals, because it "fails to make specific findings as to the matters on which their valuations were based nor what evidence they did consider" in making the award. The court stated (*ibid.*) that "the Commission is clearly in error either in its findings of fact or in the application of the appropriate principles of law in consideration of applying the law to the facts." Pointing out that the case had been pending for more than five years, the court stated (*ibid.*) that it should not be delayed by another remand. Accordingly, the court ruled on the evidence, amended the commissioner's findings by making its own findings, and applied "what it conceives to be the correct legal principles to the facts" (*ibid.*).

The court stated (J.A. II, 82) that the "Commission was clearly erroneous in finding that 345 acres were suitable for residential and commercial lots"; that 193 lots were the maximum that were suitable for that purpose; and that it was "impossible from the general report to know what valuation the apprais-

ers placed on each of the four parcels." The court concluded that the property should be divided into three rather than four categories and, on this basis, it found (J.A. II, 83), that, as of the date of taking, the fair market value of tract 12 was $343,000. This was based on a valuation of $1,000 per lot for the 193 lots which the court found were suitable for subdivision purposes, $85,000 for the boat-yard land, and $65,000 for the remainder (J.A. II, 86). The court further held that the fair market value of tract 10 was $3,000 (J.A. II, 83).

The court of appeals reversed and reinstated the award of the commission. It held (App. A, *infra*, pp. 24, 22) that "the preponderance of the testimony supports the finding of the commissioners"; that the latter were not required to find a separate "value for each of the subtracts of tract 12"; and that the requirement in Rule 53(e)(2) of the Federal Rules of Civil Procedure that in non-jury actions the court shall accept a master's findings of fact "unless clearly erroneous," which is made applicable to condemnation proceedings by Rule 71A(h), "requires acceptance of the finding of the commission."

REASONS FOR GRANTING THE WRIT

1. This case—and the related case of *United States* v. *Hall*, from the Ninth Circuit, in which a petition for a writ of certiorari is being filed simultaneously—present important issues of judicial administration relating to the use of commissions for determining the issue of just compensation in federal condemnation cases. The decision below sustained a reference to commissioners because of "the variety and com-

plexity of the matters to be considered on the question of valuation" (App. B, *infra*, p. 32)—a standard which, as we show *infra*, pp. 11–12, would sanction references in perhaps half of all government condemnation cases and in a majority of the important ones. Thus, although the intention of the framers of the Rule was that litigants' demands for trial by jury in condemnation cases would ordinarily be honored, and that a reference to commissioners would be the exception (see *infra*, p. 11), the effect of the decision below, if allowed to stand, would be to defeat this intention and to permit references to become the general practice rather than the exception.

As we point out in the *Hall* petition (pp. 12–13), there is a growing and disturbing trend among the federal district courts toward the routine use of commissioners in condemnation cases—a result that we believe was clearly not intended by the framers of the Rule. The decision below, by sanctioning a standard for references that could be met in virtually every case in which there is a substantial difference of opinion with respect to important valuation issues, will inevitably further increase that trend. Indeed, the decision of the court below on the first appeal has become perhaps the leading authority for the proposition that the complexity of the valuation issues is a sufficient basis for a reference.[4]

[4] See, in addition to the *Hall* decision (*Hall* petition, App. p. 28), *United States* v. *Delaware, L. & W. R. Co.*, 264 F. 2d 112 (C.A. 3), certiorari denied, 361 U.S. 819; *United States* v. *Buhler*, 254 F. 2d 876 (C.A. 5); *United States* v. *5,677.94 Acres of Land, Etc.*, 162 F. Supp. 108 (D. Mont.); *United States* v. *Certain Interests in Property*, 163 F. Supp. 518 (D. Mont.).

2. In its first opinion, the court of appeals recognized (App. B, *infra*, p. 31) that "the rule prescribes 'trial by jury as the usual and customary procedure to be followed, if demanded, * * * and as authorizing reference to commissioners only in cases wherein the judge, in the exercise of a sound discretion based upon reasons appearing in the case, finds that the interests of justice so require.' Report Judicial Conference of United States March 1952, pp. 8 and 9."[5] Other courts of appeals similarly have consistently construed Rule 71A(h) as authorizing the denial of a demand for jury trial, and a reference to commissioners "only in exceptional cases where because of peculiar circumstances trial by jury was inadvisable." See *United States* v. *Theimer*, 199 F. 2d 501, 503 (C.A. 10), and our *Hall* petition, pp. 13–16.

The grounds upon which the trial court here based its finding that the interest of justice required the reference to commissioners—reasons which the court of appeals correctly summarized as "the variety and complexity of the matters to be considered on the question of valuation"—would also be present in virtually every large and difficult condemnation case. Such factors as the quality of the land, its availability

[5] The Report of the Judicial Conference was made approximately one year after Rule 71A was promulgated on April 30, 1951 (341 U.S. 962), in commenting on a proposed bill (S. 1958, 82nd Cong.) that would have guaranteed any party to a federal district court condemnation action the right to trial by jury "except where a tribunal has been specially constituted by an Act of Congress governing the case for the determination of that issue." In recommending that Rule 71A should not be changed as proposed by the bill, the Judicial Conference approved the interpretation of the Rule quoted in the text.

for special uses (such as the beach residential development and hunting and sport fishing here involved), and the value of possible mineral rights, are nothing more than the elements that make the case a difficult and complex one. If they are sufficient to justify a reference, we believe that trial by jury in important federal condemnation cases could easily soon cease to be "the usual and customary procedure" under Rule 71A(h). Indeed, this is not just mere speculation. As we point out in the *Hall* petition (pp. 12–13), there are five districts in which all condemnation cases (which in those districts totalled 1782 tracts as of December 31, 1959) are now being referred to commissions, and there are a substantial number of other districts in which a majority of such cases is no longer being tried before juries.[5a]

In *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, this Court, in holding that a district court had improperly referred two civil antitrust cases to a master for trial of the general issue, rejected the argument that the references were justified because "the cases referred had unusual complexity of issues of both fact and law" (p. 259). "On the contrary," the Court stated (*ibid.*), "we believe that this [complexity] is a impelling reason for trial before a regular, experienced

[5a] Four years ago the Court denied the government's petition for a writ of certiorari in *United States* v. *Chamberlain Wholesale Grocery Co.*, 350 U.S. 989. Review was there sought of the question whether Rule 71A(h) authorizes a reference to commissioners in the absence of exceptional or extraordinary circumstances. Since that time, as indicated in the text and in the *Hall* petition (pp. 12–13), there has been a growing tendency among federal district judges to refer condemnation cases to commissioners as a routine matter.

trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work."

The same reasoning, we believe, requires rejection of the view that complexity of the issues justifies reference of a condemnation case to commissioners. The issue of just compensation is a question of fact, and the more difficult and complex the issue, the greater the need and desirability of having it determined by a jury acting under the direct supervision and control of a federal district judge, rather than by an *ad hoc* commission. The court of appeals' statement that a commission consisting of "a distinguished lawyer and two experienced real estate dealers would bring to the difficult questions of valuation presented an expertness which could not be expected of a jury" (App B, *infra*, pp. 31-32) points up the danger of widespread use of commissions, particularly those chosen from the vicinity. Although Rule 71A(h) contemplates that in exceptional circumstances a commission rather than a jury may be used to determine just compensation, it did not intend to change the basic character of the function of the triers of the facts, namely, the evaluation by non-experts of the expert evidence. "Under the Federal rule the commissioners, in a large measure, serve the function of a jury" (*United States* v. *Wallace*, 201 F. 2d 65, 67 (C.A. 10). Under the court of appeals' view, however, the commissioners—especially, as is usually the case, those selected from the local area—cease to be a group of laymen who evaluate the expert testimony and tend to become the valuation expert themselves, with their own views and predilections.

A further consideration that strongly favors limiting the district court's discretion to make references in condemnation cases to truly extraordinary and unusual circumstances, and not to permit a reference merely because the issues are complex, is "the fact that among other things a reference to a commission tends unduly to prolong the proceedings, thereby causing vexation to all concerned and additional expense." *United States* v. *Delaware, L. & W.R. Co.*, 264 F. 2d 112, 115 (C.A. 3), certiorari denied, 361 U.S. 819. See the discussion of this point in the *Hall* petition, pp. 20–22. Inevitably, there will be objections to the confirmation of the commission's report by the district court, and often subsequent appellate proceedings which may result in a further reference to the commission, with still more delay. And, of course, the greater the complexity, the greater the delay.

The instant case vividly illustrates this unfortunate characteristic of the delays that result from the use of commissioners in condemnation proceedings. The declaration of taking was filed more than seven years ago, and the case is not yet finished. In the interval, there have been two references to the commission, two proceedings before the district court, and two appeals, in the first of which the award was vacated because of the inadequacy of the commission's report. If the district court initially had granted the government's demand for a trial by jury, the matter could have been disposed of in a relatively brief trial, without lengthy litigation over such issues as the adequacy of the commission's findings. Had that course been here followed—

a course which, we believe, was what the Rule clearly contemplates in a case of this character—we think it plain that the proceedings would have long since been completed.

3. This case also presents important questions with respect to the procedures to be followed by commissioners in making their awards. Since the district court is required to accept the commissioners' findings unless "clearly erroneous," court review of commission decisions is necessarily extremely limited. In the circumstances, it is particularly important that the commission set forth explicitly and clearly the basis for its decision. For, as the court of appeals pointed out in its first opinion (App. B, *infra*, p. 33), if there is to be "any adequate review of the report," it is "essential" that the commissioners "make specific findings as to the matters on which their valuations were based and show in their report how they applied the applicable principles of law in reaching their ultimate conclusions."

The kind of findings that the court of appeals (in the decision below) held were adequate to sustain the commission's award in this case do not properly disclose the basis of its valuation. Although the commission divided the land into four categories which had different highest and best uses, it did not indicate how much of the total award was attributable to each of these sub-tracts. Without such a breakdown, it is impossible to know the basis on which the commission reached its ultimate conclusion that the fair value of the entire tract was $484,000.* Since the

*The calculations by which the court of appeals attempted to show that "the only real difference" between the commis-

value of a particular parcel of real estate ordinarily cannot be determined with exactitude, but depends upon "a guess by informed persons" (*United States* v. *Miller*, 317 U.S. 369, 375), it is particularly important in eminent domain cases, if there is to be effective judicial review of commission awards, that the commission make findings that explicitly explain its valuation process.

The court below further erred, we believe, in holding that "[i]t was not necessary that the Commission rule on the admissibility of testimony and exclude that which was incompetent" (App. B, *infra*, p. 34). While the commissioners did indicate that they had

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sion and the district court was with respect to the number of acres suitable for subdivision purposes (App. A, *infra*, p. 25) were unwarranted. The commission found that 345 acres were suitable for that purpose. The district court held that this finding was erroneous and that only 193 acres met this standard. In reaching its total valuation of $343,000, the district court used a valuation of $1,000 for each of these 198 subdivision lots. The court of appeals, holding that the commission's finding that 345 lots were suitable for subdivision purposes was supported by the evidence, attempted to test the award of the commission by applying the $1,000-per-lot valuation used by the district court to the larger number of lots found by the commission. On this basis, it found a value for tract 12 of $488,920, as against the $484,000 found by the commission (App. A, *infra*, pp. 24–25).

But there is an obvious difference between the per-acre value of 193 acres and of 345 acres where the land is to be subdivided. Neither the commission nor the district judge found that the demand for this land, if subdivided, would be sufficient that 345 acres would be worth $1,000 per acre. On the contrary, in view of the undisputed evidence that there were only 780 buildings in the entire Nag's Head area four years before the trial and about 1200 at the date of trial (J.A. I, 294), the value per acre would have been much less if 345 instead of 193 acres were to be subdivided.

not relied on certain evidence, their statement with respect to other evidence to which objection had been made that, if they "were of the opinion that the objection was properly taken, the testimony was not considered" (J.A. II, 39), obviously did not inform the reviewing court what portions of such testimony were relied on. Unless the court knows precisely what evidence was used and for what purpose, it cannot effectively perform its reviewing function. Moreover, the practice of permitting the commission to receive everything that is offered, without having to rule on its admissibility, necessarily results in still further delays in hearings before commissioners.

CONCLUSION

This case presents important questions as to the standards and procedures governing the use of commissioners in the determination of just compensation in federal condemnation proceedings, which should be determined by this Court. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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APRIL 1960.

APPENDIX A

United States Court of Appeals
for the Fourth Circuit

No. 7817

DAISEY L. CUNNINGHAM AND BEATRICE I. CUNNINGHAM, OWNERS OF TRACT NO. 10, AND W. A. WORTH AND WIFE, ETHEL E. WORTH, AND OREGON INLET INC., OWNERS OF TRACT NO. 12, APPELLANTS,

versus

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. Johnson J. Hayes, District Judge

(Argued April 9, 1959. Decided September 26, 1959.)

Before SOBELOFF, *Chief Judge*, HAYNSWORTH, *Circuit Judge*, and BOREMAN, *District Judge*.

HAYNSWORTH, *Circuit Judge:*

The present question in this much litigated condemnation case is whether the District Court properly rejected the supplemental report and award of the commission and substituted its own findings and conclusions.

The land involved is the southern portion of Bodie Island, North Carolina. It contains approximately 1858 acres bounded on the east by the Atlantic Ocean, on the west by Pamlico and Roanoke Sounds, on the

south by Oregon Inlet and on the north by other lands of the United States. Still farther north, but still on Bodie Island, are Nags Head, Kill Devil Hills and Kitty Hawk. The condemned land has approximately four miles of ocean frontage and it is roughly one mile wide measured from ocean to sound.

The land had been improved in 1951 by the construction of a state highway running through it from north to south approximately 1200 feet inland from the ocean. The highway terminates near the southern end of the property at a ferry slip from which free ferries operate to Hatteras Island. The highway gives access to the land from Nags Head and other resort areas to the north.

After the highway was completed, electric power and telephone lines were run through the property.

The land was largely undeveloped. There was an artificial duck pond, a 12-room residence and other buildings useful to a hunting club. Near the inlet was a boat basin, with docks, an ice house and other facilities for servicing commercial and sport fishing vessels and pleasure craft. With the new accessibility provided by the highway, and the availability of electric power and telephones, development of the ocean frontage for residential purposes became practical. The District Court and the Commission each attributed the greatest value to that portion of the ocean frontage which is sufficiently high for residential use.

In 1948, the owner platted a residential subdivision of 5,000 feet of his ocean frontage. This was divided into 100 lots, each fronting 50 feet on the ocean, extending back to the road and containing approximately one acre. He sold seven of these lots. He explained his failure to sell more by his wish to hold them for the higher prices he anticipated after completion of

the highway and the fact that soon after the highway was completed it became known that the land was to be condemned.

Two of the seven lots sold are also involved in this proceeding. They are referred to as tract 10. The remainder of the land is referred to as tract 12.

After deciding that the United States could lawfully condemn the land for use as a part of the Cape Hatteras National Seashore Recreation Area,[1] the District Court appointed a commission to determine just compensation. As commissioners, he appointed an attorney and two experienced real estate men in whom he had great confidence.

The commissioners held extended hearings in nearby Manteo and in Raleigh. They went over the land on foot and in motor vehicles. They inspected it from the water by boat and from the air by helicopter. They then filed a brief report in which they found just compensation for tract 10, the two lots, to be $4,000 and for tract 12, the remainder of the land, $484,000.

The report contained no findings of basic facts and no statement of the considerations which led the commissioners to their conclusion. The District Court reviewed all of the evidence, made certain findings and confirmed the award.[2] We reversed.[3] Though the District Court had supplied the findings we thought essential to the validity of the award, he had accepted the commission's valuation rather than making an independent valuation based upon his appraisal of the testimony and his knowledge of the land. We directed that the case be resubmitted to the com-

[1] *United States* v. *Southerly Portion of Bodie Island*, N.C., D.C., E.D., N.C., 114 F. Supp. 427.

[2] See *United States* v. *Southerly Portion of Bodie Island*, D.C., E.D., N.C., 19 F.R.D. 313.

[3] *United States* v. *Cunningham*, 4 Cir., 246 F. 2d 330.

mission in order that it might make basic findings and supply a statement of the legal principles it applied.

In resubmitting the case the District Court gave the commission detailed and specific instructions. At the request of the United States, he informed the commissioners that they were not bound by their previous valuation, but were free to find just compensation to be more or less than their earlier conclusion.

In due time the commissioners reported that in order to find the highest and best use they had divided tract 12 into four subtracts:

Tract A—the upper portion of the ocean frontage. They found that 345 acres between the ocean and the highway, bounded on the north by the property line, were suitable for residential development. They found that this tract was high enough for the purpose and no more susceptible to tidal overflow and storm damage than other areas previously developed on the island.

Tract B—the lower portion of the ocean frontage. They found that 182 acres, south of tract A were too low for residential development. Its highest and best use they found to be for recreational purposes, sport fishing and other water and beach activities.

Tract C—the boat yard. They found that a tract of approximately ten acres around the boat basin, upon which were located the facilities for servicing boats, was presently put to its highest and best use.

Tract D—the remainder of tract 12. The commissioners found that the 1321 acres lying between the highway and Roanoke Sound were best used for the purposes of a hunting and fishing club. They found this tract had some potential for beach development and small commercial facilities. Most of this tract is quite low, but, with its artificial lake, it provided breeding and feeding grounds for wild fowl and

game. With its large residence and other facilities, it already had been developed as a hunting club.

The commissioners found that the subtracts were complementary. The varied opportunity for sport and recreation offered by tracts B, C and D would tend to enhance the value of tract A, and the potential of tract A for residential development would tend to enhance the value of the other areas.

The report contains many other specific findings of fact, statements of their use of many evidentiary facts and statements of the legal principles they applied. It concludes with a determination of just compensation, $4,000 for tract 10 and $484,000 for tract 12.

The resident judge having become ill, the report was brought before another District Judge for his consideration. He concluded that the report did not meet the requirements of the mandate of this court. He, therefore, set it aside, made his own findings upon his review of the record and reduced the award to $3,000 for tract 10 and $343,000 for tract 12.[4]

We think he should have accepted and confirmed the report and award of the commissioners.

The failure of the commissioners to find a value for each of the subtracts of tract 12 is the first ground of attack upon the report. It may be that, under the circumstances of this case, we would not find fault with a report which separately valued each use area and found just compensation to be the sum of the separate values. See *United States* v. *City of New York*, 2 Cir., 165 F. 2d 526. In the earlier appeal, however, we admonished the commissioners:

> "* * * This testimony (of values of portions of the land for special purposes) was admissible as bearing on the question of valuation, even though it was required that the property

[4] See *United States* v. *Cunningham*, 166 F. Supp. 76.

be valued as a whole. Cade v. United States, 4 Cir., 213 F. 2d 138. It would not be proper, however, to attempt to arrive at value by adding these elements of value together. Morton Butler Timber Co. v. United States, 6 Cir., 91 F. 2d 884; United States v. Certain Parcels of Land, 5 Cir., 149 F. 2d 81. * * *"

It is true we were then thinking, in part, of testimony that the land contained ilmenite and had a value for mining purposes, a use inconsistent with other claimed uses. We can hardly say the commissioners failed to follow our instructions, however, when they did what they were told to do by this Court and by the District Court. In resubmitting the case, the District Court instructed the commissioners to find a single value for tract 12 as a whole.

No one requested the courts to instruct the commissioners to find separate values for the subtracts until the landowners did so after the completed report had been considered by the District Court. No one requested the commissioners to find such values. Furthermore, the absence of separate valuations is no undue hindrance to judicial review, for, as will presently appear, the reason for the differences between the findings of the commissioners and those of the District Judge is clear.

The District Judge thought the commission plainly wrong in finding that 345 acres (tract A) could be developed economically for residential use. He found that only 193 lots, approximately 193 acres, could be so developed and these would require expensive filling to increase their elevation. In reaching the conclusion he did, he relied, in part, upon testimony which is equivocal in the record.

Necessarily, the commission drew the boundaries of the subtracts only after the witnesses had testified. Frequently lacking outstanding topographical fea-

tures to use as reference points, witnesses identified areas about which they testified by pointing to their locations upon a map. The commissioners could see and understand the identification, but the reader of the transcript is left in some confusion. In many instances, the context suggests that witnesses testifying that land was too low for subdivision or would require extensive filling were referring to areas which the commission incorporated in tracts B or D. In one instance, testimony which the District Judge thought applicable to tract A must have referred to an area in tract D; it was first identified as being east of the highway, but internal references to topography and a later explanation of the witness show that he was describing a lowlying area in tract D.

This is not to say that there were no conflicts in the evidence. Some witnesses thought no more than 100 acres were really suitable for subdivision. The testimony of others supports the commission's finding. If the dubious references are eliminated, the preponderance of the testimony supports the finding of the commissioners. They heard and saw the witnesses. What may be uncertain to us from a reading of the transcript was plain to them. They also closely examined the land themselves and compared tract A with other developed areas on the island. Under these circumstances, Rule 53(e)(2) of the Federal Rules of Civil Procedure, made applicable here by Rule 71A(h), requires acceptance of the finding of the commission.

The District Court, finding demand for the facilities of the boat yard on the increase, felt that 25 acres of surrounding land should have been allotted to tract C. He valued those 25 acres with their improvements at $85,000. The 193 acres, approximately, of tract A, which he found suitable for subdivision, he valued at $1,000 an acre, while the remainder of tracts A,

B and D he valued at $65,000, or less than $40 an acre. Had the District Court accepted the commission's finding that 345 acres were suitable for subdivision, using his values, he would have arrived at a total valuation for tract 12 of $495,000 less the value he did assign to the portion of tract A he thought unsuitable for subdivision.[5] Deducting something for those acres on the basis of the average value he used would reduce our projection of his award to $488,920 for tract 12. This compares with the $484,000, which the commission awarded and reveals the only real difference between the commission and the District Judge as their view of the evidence of the amount of land which could be subdivided.

We think the commission's finding that 345 acres were suitable for subdivision should have been accepted.

Whether tract 10, the two lots, should be valued at $4,000, as found by the commission, or at $3,000, as found by the District Court, is a matter of judgment. After concluding that the commission's report could not be accepted, the District Court made an independent finding which is supported by the testimony. There is also testimony to support the commission's valuation, and since we conclude their report was not fatally defective, their valuation must be accepted.

There was testimony about the sales value of individual lots, which the United States complains may have been misused by the commission. The report discloses its use, however, and a proper regard for the rule which prohibits valuation of land not yet effectively subdivided as if it had been. The amount of

[5] 152 acres at $40 an acre (the average value he assigned to tracts B and D and 152 acres of tract A) would be worth $6,080.

the award supports the commission's statement of its approach.

Evidence was introduced that in 1949 the Chief of Army Engineers recommended dredging the channels through Oregon Inlet and from that inlet to Manteo to increase the minimum depth from six feet to twelve feet. Congress approved the project in 1950.[6] No funds had been appropriated for the purpose, however, and no work had been done.

The Commission found that the prospect of this channel improvement added something to the value of the boat yard. The yard was already patronized by smaller commercial fishing vessels, and deepening the channel would permit vessels of greater draft to work the nearby waters from Oregon Inlet, avoiding long runs to other ports.

The general rule that government need not compensate a landowner for values it creates by establishment of the project which results in the taking is not to be carried to extremes. The Supreme Court has suggested that it is to be limited to the land in the probable scope of the original project and to values created by that project which occasions the taking. *United States* v. *Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336. The court in *Iriarte* v. *United States*, 1 Cir., 157 F. 2d 105, pointed out the wide effect of governmental policies upon the values of real estate. Beyond the limits indicated by the Miller case, those effects upon value cannot be eliminated in determining just compensation. The value of much waterfront property is dependent upon governmental maintenance of channels and harbor improvements. Where the burden of such maintenance has been undertaken by government, private transactions reflect the enhanced value of waterfront property. If

[6] Act of May 17, 1950, 64 Stat. 163, 164.

government later condemns the property, just compensation should not be less than private purchasers would pay.

We agree with the court in Iriarte that the only question here is whether there was such a reasonable prospect of the improvement in the foreseeable future as to affect sales value in private transactions or only a hope that would have no recognizable value in commerce. In Iriarte, the harbor improvement had not been authorized by the Congress. The Chief of Army Engineers had not recommended it. The owner had no more than a speculative hope that federal aid might be forthcoming in an uncertain future. Here the project had been authorized by Congress. No funds had been allocated to the project, but the authorization created a substantial prospect of accomplishment of the improvement. Private individuals would not immediately negotiate on the assumption the work was done, but they would not ignore the Congressional authorization in their dealings.

As the District Court found, demand for the services of the boat yard was increasing. The Congressional authorization gave more than a vague hope of further increases to come. We think the commission properly considered the prospective harbor improvement as a relevant fact in the valuation process.

The United States finds fault with a number of subordinate findings of the commission. We have considered them all. We find them supported by the record and the commission's treatment of evidentiary facts proper and reasonable.

The judgment of the District Court will be reversed and the case remanded with directions to accept and confirm the report and award of the commission.

Reversed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7402

UNITED STATES OF AMERICA, APPELLANT,

versus

DAISEY L. CUNNINGHAM AND BEATRICE I. CUNNINGHAM, OWNERS OF TRACT NO. 10, AND W. A. WORTH AND WIFE, ETHEL E. WORTH, AND OREGON INLET, INC., OWNERS OF TRACT NO. 12, APPELLEES.

In the Matter of United States of America, Plaintiff, *versus* Southerly Portion of Bodie Island, Nags Head Township, Dare County, State of North Caroline, and W. A. Worth, et al., and unknown owners, Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City

(Argued May 28, 1957. Decided July 18, 1957.)

Before PARKER, *Chief Judge*, and SOPER and HAYNSWORTH, *Circuit Judges*.

PARKER, *Chief Judge:*

This is an appeal by the United States from a judgment awarding compensation in an action for the condemnation of land. Three questions are raised by the appeal: (1) whether it was error to appoint commissioners for the trial of the issue of just compensation in the face of a demand by the government for a jury trial; (2) whether the report of the commissioners was sufficient to furnish an adequate basis of

review by the District Court and by this Court; and (3) whether the inadequacy of the report of the commissioners was cured by the findings of the District Judge. We think that all of these questions should be answered in the negative and that, while the appointment of the commissioners should be sustained, the judgment below should be vacated and the case remanded to the end that the commissioners may make adequate findings as to the basic and evidentiary facts upon which their valuations are based and that their report may then be reviewed by the District Judge in the light of such findings.

The property, which was taken on June 25, 1953, consists of a peninsula four miles long and one mile wide, containing approximately 1,858 acres, lying on the outer banks of North Carolina between the Atlantic Ocean and Roanoke Sound. While the property was largely undeveloped, it was near the Nags Head beach area and was capable of development as beach property for residential and commercial use. There was much testimony as to the value of the ocean front lots and other lots and as to a portion not suitable for lots but for the development of a sport fishing area. A public highway had recently been built across the property which had enhanced its value; and its value had been enhanced also by the creation of an artificial lake. It had been used as a hunting club and there were a number of buildings on it including a dwelling house of twelve rooms, a smaller dwelling house, a boat house, a garage and stables. A mineral, ilmenite, had been found on the property and evidence was offered as to its value. The property owner himself testified that he thought that this increased the value of the property to the extent of $100,000.

The court found that, because of the character, location and quantity of the property, the contention

as to the presence and value of minerals, the distance of the property from the nearest place where the court could sit, the importance of having the land viewed by those who were to value it and the convenience of parties and witnesses, it was in the interest of justice that the issues of compensation be determined by a commission of three persons rather than by a jury, and proceeded to appoint such commission, laying down in an order the principles which were to be observed by them in the discharge of their duties. The commissioners conducted a lengthy hearing and carefully examined the property, going over it by foot, by motor vehicle, by boat and by helicopter. They reported to the court the evidence which they had taken and the objections which had been entered thereto, without, however, ruling on the objections or indicating what parts of the evidence, if any, had not been considered or in what respect other portions had been considered in arriving at valuations. In their report, they made no findings as to the basic or evidentiary facts upon which their valuations were based, but reported merely that they found as a fact that the fair market value of the property at the time of taking was $488,000. The government filed exceptions to the report on the ground that it did not contain "conclusions of law and findings of evidentiary, basic or primary facts" and that the record contained irrelevant and incompetent testimony upon which no ruling had been made by the commission.

We think that there can be no question but that the District Judge was acting well within the limits of the discretion reposed in him by Rule 71A(h) in appointing the commission in this case and that no abuse of the discretion is shown. The pertinent portion of that rule provides:

> "* * * any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it."

It is true that the rule prescribes "trial by jury as the usual and customary procedure to be followed, if demanded; * * * and as authorizing reference to commissioners only in cases wherein the judge, in the exercise of a sound discretion based upon reasons appearing in the case, finds that the interests of justice so require". Report Judicial Conference of United States March 1952, pp. 8 and 9. The trial judge found here that the interests of justice required the appointment of the commission and this finding was made upon reasons appearing in the case and set forth in his order of appointment. There can be no question but that they were adequate. The quantity of the land, its availability for beach residential development, the elements of value presented by its availability for hunting and sport fishing, the question as to whether the discovery of ilmenite added to its value, the importance of its being carefully gone over by those who were to value it and the impracticability of having a jury do this in view of its distance from the place where the nearest federal court was held,—all these things taken together certainly justified the appointment of a commission, which would not only serve the convenience of parties and witnesses and make a personal examination of the premises, but which, composed as it was of a distinguished lawyer and two experienced real estate

dealers, would bring to the difficult questions of valuation presented an expertness which could not be expected of a jury. Certainly the appointment of the commission could not be held an abuse of discretion. *United States* v. *Wallace* 10 Cir. 201 F. 2d 65; *United States* v. *Waymire* 10 Cir. 202 F. 2d 550; *United States* v. *Chamberlain Wholesale Grocery Co.* 8 Cir. 226 F. 2d 492.

The very reasons which justify the appointment of the commission, however, demonstrate the inadequacy of the commission's report. The justification of the appointment is the variety and complexity of the matters to be considered on the question of valuation and the importance of having these adequately set forth in a report so that they may be subjected to the scrutiny of the District Court and of this court upon review and the proper principles of valuation applied to them. Any adequate review of the facts or of the legal principles followed in basing valuations on the facts is defeated if a report by the commission is of such a character that it amounts to no more than a general verdict by a jury.[1] The verdict of a jury of twelve men may reasonably be dispensed with if commissioners make a report which furnishes an adequate basis of review by the trial judge and the appellate court, but not if the report furnishes no such basis. Just as a judge in a trial without a jury is required to make adequate findings so that his conclusions may be reviewed by the appellate court[2] so a master, in an action to be tried without a jury,

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[1] The case is very different from *United States* v. *Pendergrast* 4 Cir. 241 F. 2d 687, where the issues were simple and we held that the decision below could be reviewed as well without findings as with them.

[2] 1 R.C.P. 52(a); *Hatahley* v. *United States* 351 U.S. 173, 182; *Dalehite* v. *United States*, 346 U.S. 15, 24 n. 8; *Kelley* v. *Everglades Drainage District* 319 U.S. 415 and cases there cited.

is required to make findings of fact so that his conclusions may be adequately reviewed by the trial judge,[1] who is required to accept them "unless clearly erroneous" (Rule 53(e)(2)), and this practice with respect to the report of a master is prescribed by Rule 71A(h) with respect to reports of commissioners in condemnation proceedings.

Here the different values of various parts of the land, the different uses for which some parts of it were available, the differences in value which it would have for these various uses; the requirement that only the most valuable use be accepted in valuation, all of these made it essential, if there was to be any adequate review of the report of the commissioners, that they make specific findings as to the matters on which their valuations were based and show in their report how they applied the applicable principles of law in reaching their ultimate conclusions. Particularly was this important in view of the fact that there were numerous objections to testimony, some of which was held by the lower court to be irrelevant and incompetent; and in the absence of such findings it is impossible to determine to what extent, if any, this testimony entered into the commission's valuation. Furthermore, there was considerable testimony as to value of special portions of the land and as to values of portions thereof for special purposes. This testimony was admissible as bearing on the question of valuation, even though it was required that the property be valued as a whole. *Cade* v. *United States* 4 Cir. 213 F. 2d 138. It would not be proper, however, to attempt to arrive at value by adding these elements

[1] See Moore's Federal Practice 2d ed 1951 sec. 53.12(3) p. 2978–2979; *Helfer* v. *Carona Products Co.* 8 Cir. 127 F. 2d 612, 614–615.

of value together. *Morton Butler Timber Co.* v. *United States* 6 Cir. 91 F. 2d 884; *United States* v. *Certain Parcels of Land* 5 Cir. 149 F. 2d 81. It was not necessary that the Commission rule on the admissibility of testimony and exclude that which was incompetent or that it state that it was admitting for a limited purpose testimony which was admissible only for such purpose; but, for any intelligent review of its findings to be made, it was necessary that the commission indicate what use, if any, it had made of such testimony in arriving at its valuations.

We do not think that the defective nature of the report was cured by the findings made by the judge. It is true that his findings are full and comprehensive; but, after making these findings, he did not make a valuation based thereon or on his own evaluation of the testimony in the cause, but accepted the valuation of the commission, saying:

> "My belief is that the value fixed by the Commissioners is probably greater than the land would have sold for on the open market on the date of the taking. I have known the land for many years and am acquainted in somewhat more than a general way with its nature and topography, the uses to which it might be put, and the factors which might have influenced the market value. And I have acquainted myself with the evidence heard by the Commissioners. I am quite sure that the valuation found by the Commissioners is greater than I would have found from what I have seen and upon the transcript of the evidence. However, the Commissioners, who are experienced men and entirely impartial, viewed the lands from the air, from the water and on the ground, and, besides, heard the witnesses give their testimony. I have the utmost confidence in their integrity and their judgment. There is no

reason to question either. Under the rule and the cases I must accept their finding unless I find it 'clearly erroneous.' This I do not and cannot find. It is one thing for me to feel that I would have placed a lower value on the land and quite another thing for me to find that their finding is clearly erroneous and substitute my own finding for theirs, ignoring their judgment and integrity, the fact that they critically inspected the land, and also the fact that they heard the witnesses give their testimony."

And in denying the petition for rehearing he said:

"* * * the Court wishes to make it clear that the Court did not and does not undertake to say that the award made by the Commissioners was in any respect unfair or erroneous or that it exceeded the fair market value of the land in question on the date of taking. The Commissioners examined the land with great care. They heard the witnesses testify and were able to judge both their credibility and their knowledge of the land and its value, *and the Court is not justified in substituting its idea of the probable value of the land,* based upon the Court's general knowledge of it without minute and careful examination, for the conclusions arrived at by the Commissioners. The personal opinion expressed by the Court was not intended to reflect in any manner, upon the accuracy and soundness of the conclusions of the Commissioners with respect to the amount of just compensation to which the property owner is entitled; and the Court wishes to repeat, the award of the Commissioners is supported by abundant and competent evidence and is accepted by the Court without any reservations as to its reasonableness and fairness to both the plaintiff and the property owner." [Italics supplied.]

It is perfectly clear from these passages that the judge was accepting the valuations of the commis-

sion under the "clearly erroneous" rule, not making and independent valuation of his own, as in cases where the findings of the commission are set aside. He states clearly that the valuations fixed by the commission, and which he adopts, were higher than he would have fixed them on the record before him. It is not possible to say whether, in fixing their valuations, the commissioners did or did not include matters as to which the trial judge would have held their findings or action to have been clearly erroneous if they had been set forth in proper findings. The judgment below must be vacated, therefore, and the case remanded to the court below with direction that it be remanded to the commission to the end that proper findings as to the basic facts may be made and that the commission may set forth the principles of law which it applies in arriving at its conclusions as to value.

Vacated and Remanded with Directions.

APPENDIX C

JUDGMENT

Filed and Entered September 26, 1959, United States Court of Appeals for the Fourth Circuit.

No. 7817

DAISEY L. CUNNINGHAM AND BEATRICE I. CUNNINGHAM, OWNERS OF TRACT NO. 10, AND W. A. WORTH AND WIFE, ETHEL E. WORTH, AND OREGON INLET, INC., OWNERS OF TRACT NO 12, APPELLANTS,

versus

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Eastern District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of North Carolina, at Elizabeth City, with directions to accept and confirm the report and award of the

commission, in accordance with the opinion of the Court filed herein.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.
CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.
H. S. BOREMAN,
United States District Judge.

Filed Sept. 26, 1959.
R. M. F. WILLIAMS, JR.,
Clerk.

* * * * *

ORDER DENYING PETITION FOR REHEARING

Filed and entered November 12, 1959

(Style of court and title omitted)

This Court having on September 26, 1959, rendered its decision reversing the judgment of the said District Court appealed from in the above-entitled cause, and remanding the cause to the said District Court with directions to accept and confirm the report and award of the commission; and the appellee having on October 26, 1959, filed a petition for a rehearing of the said cause, and said petition having been carefully considered,

It is now ordered by this Court that the petition for rehearing be, and the same is hereby, denied.

November 12, 1959.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

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RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 851

UNITED STATES OF AMERICA, PETITIONER

v.

DAISY L. CUNNINGHAM, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED

Since this case was not referred to commissioners "solely because of the 'complexity of the matters to be considered on the question of valuation,' " as the government asserts, Question 1 should properly be stated substantially as follows:

> 1. Whether the District Court abused its discretion under Rule 71A(h) in referring this particular case to commissioners.

Since it is not accurate to say that the commissioners "did not rule upon the admissibility of the evidence" and did not make any findings as to the relative importance and

value "of the various constituent elements upon which they based their ultimate determination of the fair market value of the property condemned," Question 2 should properly be stated as follows:

> 2. Whether the supplemental report of the commissioners complied with the mandate of the Court of Appeals and the instructions of the District Court and contained findings sufficient to make its determination not clearly erroneous.

REASONS WHY PETITION SHOULD BE DENIED

1. On page 6 of the Petition, the government purports to summarize the holding of the Court of Appeals on the issue of appointment of commissioners which is the primary ground for review urged upon this Court. The Statement asserts that the Fourth Circuit based its affirmance of the appointment of commissioners solely upon "complexity of the matters to be considered on the question of valuation." The same impression is left in the Questions Presented (p. 2 of government's Petition). The same statement is made again on pages 9, 10, 11, 13 and 14 of the argument in the government's Petition. Even a cursory reading of the opinion of the Court of Appeals (Appendix B to government's Petition) reveals this is simply not an accurate statement. In fact, the words "complexity of the matters to be considered" were used in a portion of the opinion relating to another and separate question on that appeal rather than the question of the appointment of commissioners, which the Court had already finished discussing.

On the specific question of whether the District Court had committed error in appointing commissioners, the

Court of Appeals for the Fourth Circuit clearly stated numerous and ample grounds for appointment. The opinion was written by Chief Judge John J. Parker, who served as Chairman of the Committee to Consider the Method of Determining Just Compensation in Condemnation Proceedings, whose Report was adopted by the Judicial Conference of the United States, March 1952, which is the very Report quoted approvingly by the government on page 11 of its Petition in this case. On the question of appointment of commissioners, the opinion stated (246 F. 2d 330; Appendix B of Petition):

> "The court found that, because of the character, location and quantity of the property, the contention as to the presence and value of minerals, the distance of the property from the nearest place where the court could sit, the importance of having the land viewed by those who were to value it and the convenience of parties and witnesses, it was in the interest of justice that the issues of compensation be determined by a commission of three persons rather than by a jury, and proceeded to appoint such commission, laying down in an order the principles which were to be observed by them in the discharge of their duties. . . .
>
> "We think that there can be no question but that the District Judge was acting well within the limits of the discretion reposed in him by Rule 71A(h) in appointing the commission in this case and that no abuse of the discretion is shown. The pertinent portion of that rule provides: . . .
>
> "It is true that the rule prescribes 'trial by jury as the usual and customary procedure to be

followed, if demanded, * * * and as authorizing reference to commissioners only in cases wherein the judge, in the exercise of a sound discretion based upon reasons appearing in the case, finds that the interests of justice so require.' Report Judicial Conference of United States March 1952, pp. 8 and 9. The trial judge found here that the interests of justice required the appointment of the commission and this finding was made upon reasons appearing in the case and set forth in his order of appointment. *There can be no question but that they were adequate. The quantity of the land, its availability for beach residential development, the elements of value presented by its availability for hunting and sport fishing, the question as to whether the discovery of ilmenite added to its value, the importance of its being carefully gone over by those who were to value it and the impracticablity of having a jury do this in view of its distance from the place where the nearest federal court was held, — all these things taken together certainly justified the appointment of a commission, which would not only serve the convenience of parties and witnesses and make a personal examination of the premises*, but which, composed as it was of a distinguished lawyer and two experienced real estate dealers, would bring to the difficult questions of valuation presented an expertness which could not be expected of a jury. Certainly the appointment of the commission could not be held an abuse of discretion. . . ." (Emphasis added)

It is manifest that the Court of Appeals had its eyes wide open and based its affirmance upon proper grounds.

including the quantity of land (1858 acres); its diverse characteristics and adaptability of the various parts for different uses (beach residential development, commercial fishing facilities, commercial and sport boat basins, hunting and recreational preserve, mining of ilmenite ore); the distance from where the nearest Federal Court sat (70 miles); the importance of having the land viewed and carefully examined by those who were to value it (the commissioners examined the property on numerous occasions from the sea by boat, from the air by helicopter, and from the land by jeep and on foot, riding and walking over the peninsula four miles long and one mile wide, which was especially important since the height and topography of the land was a crucial disputed issue—all of which would have been impractical for a jury); the convenience and expense of the parties and witnesses (most of whom were local persons who would have to travel 70 or more miles to the nearest seat of the Federal Court at Elizabeth City, whereas they lived and worked within a few miles of the Manteo, N. C., Courthouse where the commissioners sat); and the location of the land (situated on the Outer Banks of North Carolina, remote from the rest of the State accessible only by private motor vehicle and infrequently scheduled motor buses).

To specifically illustrate one of the grounds, convenience of the parties and witnesses, witnesses Earl Mann, W. M. Hedrick, Dal H. Williams, E. E. Meekins, A. W. Drinkwater, Claude C. Duval, Ezekial M. Midgette, A. S. Austin, Jr., L. J. Styron, Nikoli Miller, for the landowners, and Charles A. Marshall, Jesse H. Denniston, Harry C. Lawrence, Pennell A. Tillett, Captain T. J. Harris, for the government, (the majority of the witnesses in the case) resided in the vicinity of the Worth tract which was within only a few miles from Manteo, North Carolina, where the hearings were conducted, but 70 miles from the site of the

nearest Federal Court. "The interest of justice" was also served by the type and location of the hearing since it directly affected the fairness and completeness of the trial of the issue of the fair market value of the property.

Indeed, the government, while it tries in one breath to attack the position of the Court of Appeals for the Fourth Circuit in its decision on the first appeal, in the next breath quotes with glowing approval the position taken by the same Court in the same opinion toward Rule 71A(h) and its application (p. 11 of the Petition).

2. It is also very pertinent in the consideration of this Petition what action the District Court took on the appointment of commissioners since that is actually the Order in which was exercised the Court's discretion to refer the case to commissioners. That Order entered by the District Judge on August 19, 1954, made extensive findings of fact supporting its determination that "because of the character, location, and quantity of the property . . . and because of other reasons set forth in these findings, the Court, in the exercise of its discretion, determines that it is in the interest of justice that the issues of compensation shall be determined by a commission of three persons to be appointed by the Court." It is respectfully submitted that the reading of this Order alone will be sufficient to prompt a speedy denial of the Petition. It is set forth in the Appendix to this Brief. Indeed, the circumstances of the location, size, and character of this property as set forth in the Order appointing commissioners are tailor-made to fit the pattern of Rule 71A(h). Although the Rule states the three grounds in the disjunctive, there were ample evidence and findings here of all three. Whatever may be true of the many other cases the Department of Justice complains of which have been referred to commissioners, it cannot be fairly denied that the case at bar (which is the only one involved in this

Petition) is unusual and extraordinary and that justice and a fair determination of just compensation was promoted by its reference to commissioners by the District Judge. As Judge Parker stated, it was "well within the limits of the discretion reposed in him by Rule 71A(h)," and "there can be no question but that [the reasons] were adequate." The government's Petition overlooks that Rule 71A(h), as presently worded, places the reference in the discretion of the District Court;[1] but it is fair to say that, far from establishing an abuse of discretion, the many reasons and circumstances concerning this property make this case one in which it is difficult to conceive of the judge below or any District Judge acting otherwise.

3. The fact that a number of Federal condemnation cases have been referred to Commissioners is certainly no ground for granting certiorari in this case. Statistics concerning the number of times condemnation cases have been referred to Commissioners around the nation, without regard to the circumstances of each case, can hardly enlighten the Court on the sole question before it here — whether the court below on the facts of this case may have committed error on such a serious and far-reaching question of Federal law or whether it "has so far departed from the accepted and usual course of judicial proceedings" as to warrant review. If anything, the government's contention

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[1] *U. S. v. Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492 (C. A. 8, 1955) from which the government applied for review of the question whether Rule 71A(h) authorizes a reference to Commissioners in the absence of exceptional or extraordinary circumstances, the opinion stated that the drafters "intended a broad discretion to be vested in the District Court to choose between the use of juries or of Commissioners in the condemnation cases"; the Supreme Court denied certiorari, 350 U. S. 989.

is a problem in the administration and business of the Federal courts, and the Department of Justice should not try to herd this case into the sacrificial fold with others which have no relation or similarity to it.[2] If the government is dissatisfied with Rule 71A(h), it should proceed in proper and ordinary channels to try to get the Rule changed. Virtually everything said in its Petition is a quarrel with the commission provision of Rule 71A(h), at which the government has been sniping for some years; this does not constitute a showing of any error of the courts below in applying the existing Rule 71A(h) to this action. If, as appears likely, the government is merely using the Petition in this case and the *Hall* case as a means of gaining the ear of the Court on the need for amendment to Rule 71A(h), then it should be treated for what it is and, after being thoughtfully read, promptly denied.

4. It should be noted that question of reference to commissioners was before the Court of Appeals in the first appeal of this case and not in the decision from which review by certiorari is sought. On this prior appeal the Court affirmed the action of the District Court in referring the case to commissioners. In fact, the Fourth Circuit itself specifically re-referred the matter to these commissioners for detailed findings. While it is true that final judgment had not been entered in the case as a whole, yet, as to this action of the Court in appointing commissioners, which is the chief ground for this application for certiorari, the Order was made final on the prior appeal. It was impossible for the government to raise this question again in the district court; that Order was therefore final, and extensive further

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[2]This is the very sort of treatment the government itself complains about in the Petition for Certiorari in the case of *U. S. v. Hall*, decided by the Ninth Circuit on January 9, 1960.

proceedings were to follow in its wake. Supreme Court Rule 20 recognizes the existence of occasions for review on certiorari prior to entry of final judgment. Yet, from the first and final decision of the Court of Appeals on this point, the government did not seek certiorari. Pursuant to the Mandate of the Court of Appeals, the case went back to the commission for detailed findings. which were made in a supplemental report, and then the award and supplemental report were reviewed by a District Judge, from whose action the defendant property owners took appeal. This second decision of the Court of Appeals did not deal with the question of reference to commissioners at all because the determination of that point had already become final.

The case of *U. S. v. Hall,* in which a Petition for Writ of Certiorari was filed simultaneously with this one, stands in an entirely different posture. That Petition seeks review of a judgment of the Court of Appeals for the Ninth Circuit denying a Writ of Mandamus by which the government sought to require respondent, the Chief Judge of the United States District Court for the Southern District of California, to vacate a number of orders by which he referred many pending Federal condemnation cases to commissioners. The government no doubt followed that procedure in order to try to pave the way for review of that point. In fact, its Petition in the *Hall* case admits the weakness of the government's position in the case at bar, stating "Mandamus clearly was an appropriate remedy to vindicate that right [to a jury trial] . . . Indeed, an extraordinary writ may be the only way in which the United States can obtain effective appellate review of this important issue." (p. 23).

This case is not in any way related or comparable to the *Hall* case, in which the District Judge on his own motion and on the basis of virtually the same findings in each

case referred 21 separate condemnation cases involving 300 parcels of land for four different Federal projects for reasons which included consideration of the dockets in that district and the time involved. The grounds for reference by the court below were entirely different and unrelated, as are the facts of the two cases.

5. The government presents a rather strange argument on page 14 of its Petition. After stressing how long (seven years) this case has been in the court and how many times it has been reviewed by the District Courts and the Court of Appeals, the Petition ends up by asking this Court to reverse the case, throw out everything that has been done, and start all over again where the case was in 1953. It then puts itself in the position of asking that the case be placed on the civil trial docket of the Eastern District of North Carolina, now over two years behind. The trial of this case before commissioners consumed four weeks and would probably take longer before a jury, with the consequent enormous expense to taxpayers and litigants (both of whom used numerous expert witnesses from all over the United States in the trial below). From the outcome of the trial, an appeal to the Court of Appeals would be likely; and if error in the trial was found, a new trial would be necessary with further delay on the crowded dockets for several more years entailing further time and expense before the case could be finally ended.

In short, the government, after complaining of the seven years this case has taken (most of which time was consumed on *government* motions, appeals, requests for extensions of time and for continuations, petitions for rehearings, etc.), asks this Court to take action which would inevitably mean many more years of court proceedings and postponement of the conclusion of a case which already seems almost interminable. If ever there was a case for

the exercise of what the government in its Petition in the *Hall* case concedes to be the "natural 'reluctance to cause further delay and expense and to set at naught the . . . years of work devoted by the District Court and the Commission to [the] case' " (p. 23), surely it is the case at bar.

Respondents earnestly urge that the Record in this case establishes that it has had ample and competent review, and should now be brought to conclusion once and for all by this Court in order that the owners may finally have the unrestricted use of their just compensation, and the government be relieved of further and unnecessary expense.

6. The Court of Appeals in the decision below (Appendix A to the Petition) amply and properly answered the government's complaint (reason 3 of Petition) about failure of the Report to place separate monetary valuations on various geographic locations within the single undivided Tract 12. In describing the diverse topography of Tract 12 and the highest uses to which different portions of it were adaptable, the Commission discussed four geographic areas within the single undeveloped tract, but this was only for descriptive purposes and for convenience of reference.

No decision of this or any other court has ever announced a requirement that in valuing a single undeveloped tract with diverse characteristics the Commission or Judge must attach a separate specific monetary value to each different part, the total of which is the fair market value of the tract to be valued. In fact, there is serious question as to whether such a method might not contravene the established principles of valuation which require the tract to be valued as a single entity. That question does not have to be decided here, because whatever other method of determining the valuation could have been followed, and might have

been proper had it been followed, the salient fact is that this Commission chose to appraise the tract as a whole, just as if it were bought and sold in the actual market on June 25, 1953, as one 1858-acre tract, for one amount of money. Having made specific findings to inform the Court exactly what basic facts it took into consideration, what, if any, weight was given to the various parts of the evidence, and what principles of law were applied, the Commission proceeded to find, based on all this, the fair market value of each of the two tracts on June 25, 1953. Surely, it cannot be said as a matter of law that such a report is clearly erroneous.

The Court of Appeals, having sent the case back in the first instance to the Commission for detailed findings, was in the best position to know whether its directions had been complied with; and it determined on the second appeal that they had been fully met. It held that "We can hardly say the commissioners failed to follow their instructions, however, when they did what they were told to do by this Court and by the District Court. In resubmitting the case, the District Court instructed the commissioners to find a single value for Tract 12 as a whole." The Fourth Circuit on the prior appeal held:

> "This testimony was admissible as bearing on the question of valuation, even though it was required that the property be valued as a whole. Cade v. United States, 4 Cir., 213 F. 2d 138. It would not be proper, however, to attempt to arrive at value by adding these elements of value together. Morton Butler Timber Co. v. United States, 6 Cir., 91 F. 2d 884; United States v. Certain Parcels of Land, 5 Cir., 149 F. 2d 81."

Moreover, the Fourth Circuit on the second appeal stated: "Furthermore, the absence of separate valuations

is no undue hinderance to judicial review, for, as will presently appear, the reason for the differences between the findings of the commissioners and those of the District Judge is clear." (p. 23, Appendix A of the Petition).

7. The objection of the government concerning rulings on the evidence by the Commission is squarely answered in the decisions of the Fourth Circuit on both the first and second appeals. The detailed supplemental report of the Commission plainly shows its straightforward and realistic disposition of all disputed points of evidence to which objection was interposed (pp. 29-43 of printed Joint Appendix in *Cunningham v. United States*, C. A. No. 7817, Vol. II of Record).

CONCLUSION

The Petition falls far short of establishing why certiorari should be granted in this case, which is not by any means a "class action" for all condemnation cases referred to commissioners, but is manifestly one case, whether there be any others or not, in which reference to commissioners was appropriate.

Respectfully submitted,

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA

ELIZABETH CITY DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. SOUTHERLY PORTION OF BODIE ISLAND, NAGS HEAD TOWNSHIP, DARE COUNTY, STATE OF NORTH CAROLINA, AND W. A. WORTH, ET AL, AND UNKNOWN OTHERS, Defendants.	CIVIL ACTION NO. 262 TRACT NO. 12 ORDER

THIS CAUSE Coming on to be heard and being heard on the 19th day of August, 1954, before His Honor, Don Gilliam, United States Distric Judge for the Eastern District of North Carolina, at Raleigh in said District, on the Motion of W. A. Worth and wife, Ethel E. Worth, and

Oregon Inlet, Inc., for the appointment of Commissioners to determine the issue of compensation pursuant to Rule 71A(h) of the Rules of Civil Procedure, and upon consideration of said Motion, the evidence, and argument of counsel, the Court finds:

I.

That the lands of the movants sought to be condemned in this action comprise more than 1800 acres, the movants contending that the exact acreage is 1857.98 acres, situate in Dare County, North Carolina, and bounded on one side by the Atlantic Ocean and on another side by Roanoke Sound. Located on said land are artifically constructed duck ponds embracing about 300 acres connected with the Sound by a canal, so constructed that the depth of the water in the ponds is controlled by flood gates. The said duck ponds have been used and the movants will contend that they have been and are useful and valuable as hunting areas for wild fowl. At and near Oregon Inlet on said lands, there is located an artificially constructed boat basin providing space for the docking of small boats used for pleasure and by commercial and non-commercial fishermen and hunters. Near said boat basin, there is located a store and storerooms, and gasoline filling stations, all of which were leased, at the time of the institution of this action, to Oregon Inlet, Inc., which was engaged in the conduct and operation of a mercantile business, gasoline filling stations, and the sale of services and supplies for non-commercial fishing and hunting. The movants will contend that the petitioner took possession of the premises occupied by Oregon Inlet, Inc., thereby forcing it to dispose of its stock of merchandise and equipment at a substantial financial loss for which they are entitled to compensation. Located on said lands is a large residence which has been used and is useful as a summer cottage and also a lodge for hunters and fishermen.

to which access is had by water and by overland road connecting with the State Highway running through the movants' lands. The movants' land has a frontage on the Atlantic Ocean of approximately three miles and a hard surface State Highway extends through said lands generally parallelling the ocean frontage so that the land between the ocean and said highway varies in depth from approximately 1000 feet to approximately 1500 feet. The movants contend that much of said land lying between the Atlantic Ocean and said State Highway, as well as much of it lying west of said highway, is suitable for residential and business purposes, the lots varying in size and value, and, in determining the compensation to be paid for said lands, it is necessary that evidence be offered with respect to the topography of said land and the determination of what parts thereof are so located as to be available for residential and other beach resort purposes. That all of said lands high enough above the water to be available and suitable for beach resort purposes is not contiguous but separated by water and other natural conditions into several areas. All of the movants' land is located to the south of the beach resort commonly known as Nags Head and in such proximity that evidence of the value of the movants' land will be offered to show its adaptability and usefulness for beach resort purposes and its subdivision, development, and marketability for such purposes.

II.

The movants claim that their lands contain a valuable mineral known as ilmenite and that it is present in commercial quantities; that it will be necessary for them to use expert witnesses to testify as to the presence of said mineral in commercial quantities and to other facts with respect to practical and economical mining of said mineral and other scientific facts affecting the extent to which

the presence of said mineral affects the value of the movants' lands, and it is expensive to secure the attendance of such witnesses, which expense will be greatly increased by requiring their attendance upon a jury trial at Elizabeth City.

III.

The movants also contend that over a long period of years, by the operation of the tides and winds, they have acquired substantial acreage of land at the southern end of their lands bordering on Oregon Inlet and that said process of accretion is continuing to operate and is a factor to be considered in determining the compensation to which they will be entitled, and such facts must be shown by witnesses who live in the immediate area and can testify of their own knowledge and observation.

IV.

The Court finds that the lands of the movants are located approximately 70 miles from Elizabeth City, [illegible] quotank County, North Carolina, where the Court customarily sits and would sit for the trial of this action; that there is no means of public transportation between said Elizabeth City and said lands except by private motor vehicles and infrequent schedules of motor buses; that in the trial of the issue of just compensation in this case, many of the witnesses, other than the experts previously referred to, will be residents of the general locality of movants' lands and that to require the attendance of such witnesses upon the Court sitting at Elizabeth City would be both inconvenient and expensive to them and to the parties, whereas if Commissioners are appointed they can conduct their hearings in the vicinity of said lands and thereby greatly promote the convenience of many witnesses.

V.

Because of the location of said lands, the size of the area involved, and the varying topography, and the contentions that said lands are useful for the many different purposes heretofore enumerated, the Court concludes that it may be reasonably anticipated that a view of said lands should be had by a jury or commissioners and in such event it would be necessary for the jury or commissioners to visit parts of said land by motor vehicle and parts by water transportation, and, manifestly, it will be easier, more practical and less expensive for three commissioners to view said lands than for a jury to do so.

VI.

The Court further finds that from the representations made by the petitioners and the respondents, the trial of the issue of just compensation will consume several days time for the reception of the testimony of witnesses and other evidence to be offered by the parties, and the Court concludes that the taking of said testimony and evidence by commissioners on the premises and at nearby points will not only be convenient to the parties, their witnesses, and their counsel, but will result in reducing the costs of the hearing as well as the time consumed, and will expedite the final determination of the issues involved.

VII.

Because of the character, location, and quantity of the property of the respondents sought to be condemned in this case, and because of the other reasons set forth in these findings, the Court, in the exercise of its discretion, determines that it is in the interest of justice that the issues of compensation shall be determined by a Commission of three persons to be appointed by the Court.

IT IS, THEREFORE, CONSIDERED, ORDERED, AND ADJUDGED That the issues of compensation to be paid by the petitioner to the movants, W. A. Worth and wife, Ethel E. Worth, and Oregon Inlet, Inc., shall be determined by a Commission of three persons to be appointed by the Court by Order to be entered herein.

Entered at Raleigh, North Carolina, this the 19th day of August, 1954.

(s) Don Gilliam

United States District Judge